

### **ISSUE**

Must a judge who formerly was the corporation counsel in charge of the county's child support agency recuse himself or herself in child support cases?

### **ANSWER**

No, except in those cases where the judge served as a lawyer or has prior knowledge of disputed facts.

### **FACTS**

A judge who has recently assumed the bench expects to hear a number of paternity and child support actions brought by the county's child support agency. In addition, the judge will hear other family cases with child support issues which may require the appearance of the child support agency or some of its personnel as witnesses. Before assuming the bench the judge was the corporation counsel of the county constituting the judge's circuit and as such was responsible for the supervision of the county child support agency as a division of the office of County Corporation Counsel. Another person acted as the day to day administrator of the child support agency. An assistant corporation counsel provided the legal services and general administrative direction on behalf of the corporation counsel. The corporation counsel set the budget policy and handled employment-related issues. The corporation counsel's name did not appear on any pleadings or motions, nor did the corporation counsel appear in court on any child support matter except approximately once a year when no other assistant counsel was available. The corporation counsel is appointed by the county board. Child support policy is set by state and federal law.

### **DISCUSSION**

The Committee concludes that the issues presented involve the provisions of SCR 60.04(1)(a), (4)(a) and (c), and SCR 60.02.

#### ***SCR 60.04***

SCR 60.04 states in part:

A judge shall perform the duties of judicial office impartially . . . (emphasis

added).

....

(1) In the performance of the duties under this section, the following apply to adjudicative responsibilities:

(a) A judge shall hear and decide matters assigned to the judge, except those in which recusal is required under sub. (4) . . . .

....

(4) Except as provided in sub. (6) for waiver, a judge shall recuse himself or herself in a proceeding when the facts and circumstances the judge knows or reasonably should know establish one of the following or when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial:

(a) The judge has . . . personal knowledge of disputed evidentiary facts concerning the proceeding.

....

(c) The judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, . . .

The comment to SCR 60.06(4)(c) addresses the association of government attorneys and required recusal as follows:

A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of SCR 60.04(4)(d) [sic]; a judge formerly employed by a government agency, however, should recuse himself or herself in a proceeding if the judge's impartiality reasonably may be questioned because of such association.

SCR 60.04(4) of the Code of Judicial Conduct sets forth the conditions which require the recusal of a judge. As to judges who immediately before assuming the bench served as a corporation counsel in charge of the county's child support agency, there are at least two situations where recusal from a case is mandatory.

1. The judge served as a lawyer in the matter. While all the parties could waive recusal pursuant to SCR 60.04(6), the judge should not approve such a waiver because of the requirement of SCR 60.02 which requires that a judge uphold the integrity of the judiciary and SCR 60.03 which requires a judge avoid impropriety and the appearance of impropriety so as to promote public confidence in the integrity and impartiality of the judiciary.

2. The judge has personal knowledge of disputed evidentiary facts concerning the proceeding. While the judge, when earlier functioning as the county corporation counsel, may not have handled child support cases personally, he or she may have been consulted by an assistant corporation counsel assigned to the child support agency concerning a particular case then pending and thereby learned something about the case. Care needs be taken by the judge at the outset of a child support case to insure that the judge has no prior knowledge. Should the judge discover that he or she has been privy to prior knowledge, the judge has the duty to suspend the proceedings, disclose the prior knowledge and enter a recusal, unless a waiver be entered by all the parties pursuant to SCR 60.04(6).

In addition, there may be situations where the judge should make a discretionary decision as to recusal. Should it appear likely that a member of the child support agency, who was an employee known to the judge when acting as head of the agency, will appear in that matter to give testimony on a contested issue where the employee's credibility is subject to judicial determination, the judge has a duty to carefully review the matter to determine if recusal should be carried out. Should a lawyer whom the judge formerly supervised appear on a case which was in the agency at the time the judge was supervising the agency, the judge must make a discretionary recusal decision.

## **CONCLUSION**

A judge, new to the bench, who was formerly a corporation counsel in charge of a child support agency, need not recuse himself or herself unless the judge 1) served as a lawyer in the matter or 2) has personal knowledge of disputed facts. A judge should carefully consider the need for recusal where an employee of the agency who was formerly supervised by the judge will appear as a witness as to a contested matter which places the witness' credibility at issue or where a lawyer appearing before the judge had been supervised by the judge and the case was in the agency at the time.

### **APPLICABILITY**

This opinion is advisory only, is based on specific facts and questions submitted by the petitioner to the Judicial Conduct Advisory Committee, and is limited to questions arising under Supreme Court Rules, Chapter 60-Code of Judicial Conduct. This opinion is not binding upon the Wisconsin Judicial Commission or the Supreme Court in the exercise of their judicial discipline responsibilities. This opinion does not purport to address provisions of the Code of Ethics for Public Officials and Employees, subchapter III of Ch.19 of the statutes.

I hereby certify that this Formal Opinion No. 00-3 issued by the Judicial Conduct Advisory Committee for the State of Wisconsin this 31st day of July 2001.

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Thomas H. Barland  
Chair